

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

10 ARTHUR SHERMAN and SHERMAN & ) Case No. 5:14-cv-01064-PSG  
11 ASSOCIATES, INC., )  
12 v. ) **ORDER DENYING MOTION TO  
13 Plaintiffs, ) REMAND**  
14 HAYNES & BOONE, ET AL., )  
15 Defendants. ) **(Re: Docket No. 11)**

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16 Before the court is Plaintiff Arthur Sherman and Sherman & Associates, Inc.'s motion to  
17 remand based on (1) improper removal prior to service and (2) lack of diversity jurisdiction.<sup>1</sup>  
18 Defendant Clark Stone opposes the motion, arguing the case was properly removed to federal court  
19 based on the "pro-removal" stance of this court and because complete diversity exists. Sherman  
20 and Stone both appeared for a hearing on the motion.<sup>2</sup> After considering the arguments, Plaintiffs'  
21 motion is DENIED.

### I. BACKGROUND

22 Arthur Sherman is a citizen of Connecticut, and Sherman & Associates is a Delaware  
23 Corporation. On February 25, 2014, Plaintiffs filed a complaint in the Santa Clara Superior Court  
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25 <sup>1</sup> See Docket No. 11.  
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27 <sup>2</sup> See Docket No. 22.  
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1 for legal malpractice, breach of fiduciary duty, and elder abuse. Plaintiffs named as defendants  
 2 Haynes & Boone, MacPherson Kwok Chen & Heid LLP, Clark Stone, and Does 1-200.<sup>3</sup> No  
 3 defendant has yet received proper service. On March 3, 2014, Stone removed the case to this  
 4 court.<sup>4</sup>

## 5 II. LEGAL STANDARDS AND DISCUSSION

### 6 A. Removal Prior to Service Was Proper

7 Section 1441, the removal statute, prohibits removal if any defendant “properly joined and  
 8 served” is a citizen of the state in which the suit is filed.<sup>5</sup> Plaintiffs contend that as a citizen of  
 9 California, Stone inappropriately removed this case to federal court prior to service.<sup>6</sup> Plaintiffs  
 10 thus read into the statute a requirement that a defendant first be served before attempting to remove  
 11 to federal court. While case law outside of this district is unsettled,<sup>7</sup> the Northern District of  
 12 California has consistently held a defendant may remove an action prior to receiving proper  
 13 service, even when the defendant resides in the state in which the plaintiff filed the state claim.<sup>8</sup>

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16 <sup>3</sup> See Docket No. 1 (“Each of the defendants is a person or entity either subject to the laws of  
 17 vicarious liability, e.g. agent, employee, partner, associate, joint venture, co-participant, principal  
 18 and/or in a contractual relationship with the other defendants, and was at all times acting within the  
 19 authority and scope of such relationship and with the full knowledge, consent, authority,  
 20 ratification, and/or permission of each of the remaining defendants so that each defendant is liable  
 21 for the actions of each other defendant. . . . Defendant Stone, along with Does 1 through 200, has  
 22 personal liability for the acts or omissions of The Firm, either as a result of their own personal acts  
 23 or omissions, or by virtue of their positions within the Firm as partners to The Firm.”).

24 <sup>4</sup> See *id.*

25 <sup>5</sup> 28 U.S.C. § 1441(b)(2) (prohibiting removal “if any of the parties in interest properly joined and  
 26 served as defendants is a citizen of the State in which such action is brought.”).

27 <sup>6</sup> See Docket No. 11.

28 <sup>7</sup> See e.g. *Gentile v. Biogen Idec, Inc.*, 934 F. Supp. 2d 313, 315-316 (D. Mass. 2013) (“The  
 29 question has deeply divided district courts across the country . . . . District courts are in disarray on  
 the question presented by this case.”).

30 <sup>8</sup> See *Regal Stone Ltd. v. Longs Drug Stores Cal., L.L.C.*, 881 F. Supp. 2d 1123, 1124-29 (N.D.  
 31 Cal. 2012); *Carreon v. Alza Corp.*, Case No. 5:09-cv-5623-RS, 2010 WL 539392, at \*1, (N.D.  
 32 Cal. 2010) (“Courts in this district have routinely applied the statute as it is written.”); *City of Ann  
 Arbor Employee’s Retirement Sys. v. Gecht*, Case No. 3:06-cv-7453-EMC, 2007 WL 760568 (N.D.  
 33 Cal. 2007); *Waldon v. Novartis Pharms. Corp.*, Case No. 3:07-cv-01988-MJJ, 2007 WL 1747128

1 Like its predecessors in this district in analogous circumstances, the undersigned concludes that  
 2 Stone did not contravene congressional intent by “rush[ing] to remove the action before plaintiff  
 3 had any opportunity to serve them, thereby engaging in ‘gamesmanship.’”<sup>9</sup> The timing of the  
 4 removal was proper.

5 **B. Stone Offers Sufficient Evidence to Show Diversity Jurisdiction Exists**

6 Plaintiffs next argue Stone has not satisfied his burden of proving that diversity jurisdiction  
 7 existed both at the time the action commenced in state court and at the time of removal.<sup>10</sup>  
 8 However, Stone specified the citizenships of Sherman, Sherman & Associates, Inc., himself,  
 9 MacPherson Kwok Chen & Heid, LLP, and Haynes & Boone, LLP in his Notice of Removal of  
 10 Action Under 28 U.S.C. 1441(b) (Diversity).<sup>11</sup> In his opposition to the motion at issue, Stone  
 11 further clarified the citizenships of Defendants by submitting declarations of citizenship by Stacey  
 12 L. Brainin for Haynes & Boone and Stone for MacPherson Kwok Chen & Heid, LLP and  
 13 himself.<sup>12</sup> The declarations are not specific as to each member of the defendant law firms, but they  
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 19 (N.D. Cal. 2007); *Perez v. McNamee*, Case No. 3:06-cv-5031-CW, 2006 WL 3462791 (N.D. Cal.  
 20 2006); *Republic Western Insurance Co. v. International Insurance Co.*, 765 F.Supp. 628 (N.D. Cal.  
 21 1991); *Carper v. Adknowledge, Inc., et al.*, Case No. 3:13-cv-03921-JST, 2013 WL 5954898 at \*2  
 22 (N.D. Cal. 2013) (“a defendant must be served before its status as a local defendant can block  
 removal.”).

23 <sup>9</sup> See *Carreon*, 2010 WL 539392, at \*2.

24 <sup>10</sup> See *Quinones v. Target Stores*, Case No. 05-03570-JW, 2005 WL 5795280 (N.D. Cal. 2005)  
 25 (granting Plaintiff’s motion to remand); *Mendoza v. OM Financial Life Ins. Co.*, 5:09-cv-01211-  
 JW, 2009 WL 1813964 at \*2 (N.D. Cal. 2009) (denying plaintiff’s motion to remand); *Strotek  
 Corp. v. Air Transp. Ass’n of America*, 300 F.3d 1129, 1131 (9th Cir. 2002) (affirming denial of the  
 motion to remand).

26 <sup>11</sup> See Docket No. 1-3.

27 <sup>12</sup> See Docket No. 14 and attachments 2, 3 and 4.

1 are sufficient because at this stage, Defendants need only allege sufficient facts to satisfy the  
2 jurisdiction requirement.<sup>13</sup>

3 In the Ninth Circuit “[a] district court is vested with broad discretion to permit or deny  
4 [jurisdictional] discovery.”<sup>14</sup> Such discovery ‘should ordinarily be granted where pertinent facts  
5 bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the  
6 facts is necessary.’<sup>15</sup> And so to the extent that Plaintiffs here raise legitimate concerns regarding  
7 Stone’s showing of diversity jurisdiction, the court will permit Plaintiffs to take discovery on the  
8 issue of diversity jurisdiction without delay. This discovery may proceed immediately, as opposed  
9 to general discovery, which may only be taken after the parties complete their Rule 26(b)  
10 conference.

### 12 **III. CONCLUSION**

13 Stone’s removal prior to service was proper. While Stone’s allegations regarding diversity  
14 jurisdiction are sufficient at this stage, Plaintiffs are hereby authorized to engage in immediate  
15 discovery as to the issue of diversity jurisdiction. The court will refrain from setting specific limits  
16 on the types or numbers of jurisdictional discovery procedures authorized by this order; the parties  
17 are nevertheless cautioned that such discovery is to be narrowly focused and as limited as possible.  
18 The parties shall appear at a further case management conference on September 30, 2014 at 10:00  
19 am.

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23 <sup>13</sup> *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (noting that elements of jurisdiction  
24 must “be supported in the same way as any other matter on which the plaintiff bears the burden of  
proof, i.e., with the manner and degree of evidence required at the successive stages of litigation”).

25 <sup>14</sup> *Lamb v. U.S. Dep’t of the Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003).

26 <sup>15</sup> *Id.* (quoting *Butcher’s Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986);  
27 *Siano Mobile Silicon, Inc. v. Mavcom, Inc.*, Case No. 5:10-cv-10-04783-LHK-PSG, Docket No. 78  
28 at \*3-4 (N.D. Cal. 2011) (order granting Plaintiff renewed motion for leave to conduct discovery  
regarding personal jurisdiction).

1 **IT IS SO ORDERED.**  
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Dated: August 22, 2014

  
PAUL S. GREWAL  
United States Magistrate Judge